Supreme Court, U.S.
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No. 95-825

IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

RONALD GROGAN,

Petitioner,

vs.

LORELEI A. TAYLOR, d/b/a
ROCKY MOUNTAIN PLATEAU

Respondent.

Response to Petition for Writ of Certiorari
To the Colorado Supreme Court

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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December 22, 1995

QUESTION PRESENTED

Does the ineffective assistance of retained counsel in a civil action between private litigants have any constitutional implications?

PARTIES

The parties to this action are Petitioner, RONALD GROGAN, and Respondent, LORELEI A. TAYLOR, d/b/a ROCKY MOUNTAIN PLATEAU, LORELEI A. TAYLOR is now known as LORELEI SUTHERLAND. THE STATE OF COLORADO is a party in a related underlying action but has no interest in the petition brought by RONALD GROGAN to this Court.

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OPINIONS DELIVERED BELOW

The opinion from which Ronald Grogan has filed the Petition for Writ of Certiorari to the United States Supreme Court was issued by the Colorado Supreme Court at *Taylor v. Grogan,* 900 P.2d 60 (Colo. 1995). The underlying opinion of the Colorado Court of Appeals is reported at *Grogan v. Taylor,* 877 P.2d 1374 (Colo. App. 1993). The text of these opinions are included as appendices to Ronald Grogan's Petition for Writ of Certiorari and will not be included in this response.

JURISDICTION

Lorelei Taylor admits the jurisdiction of this Court, pursuant to 28 U.S.C. §1257(a) and that Ronald Grogan has filed a timely Petition for a Writ of Certiorari to this Court.

STATEMENT OF STATUTES, CONSTITUTIONAL PROVISIONS AND RULES

Ronald Grogan has invoked the Fifth and Fourteenth Amendments of the United States Constitution in this case. Contrary to this assertion, Lorelei Taylor believes that this case turns only upon the application of the Colorado Code of Professional Responsibility D.R. 5-102(B) which provides as follows:

> If, after undertaking employment in contemplated or pending litigation, a lawyer learns or it is obvious that he or a lawyer in his firm may be called as a witness other than on behalf of his client, he may continue the representation until it is apparent that his testimony is or may be prejudicial to his client.

STATEMENT OF THE CASE

Lorelei Taylor believes that the following additional facts and circumstances of this case need to be explained to fully understand the controversy raised by Ronald Grogan. The trial

court in this case correctly ruled that Taylor would be entitled to the testimony of both of Ronald Grogan's attorneys, Patric LeHouillier and Ron Peterson, on the issue of statute of limitations. As a result of this ruling, LeHouillier and Peterson had a conflict of interest with their client, Ronald Grogan, pursuant to the Colorado Code of Professional Responsibility D.R. 5-102(B). It was the choice of the Plaintiff, Ronald Grogan, and his attorneys, Patric LeHouillier and Ronald Peterson, to proceed with the statute of limitations trial acting as both advocates and witnesses. See *Grogan v. Taylor* at 1381.

Attorneys LeHouillier and Peterson maintained representation on this case throughout the jury trial and the Court of Appeals level and did not withdraw until certiorari was granted by the Colorado Supreme Court. See *Taylor v. Grogan* at 61 n. 3. This case arises not because of the failure of the trial court to act but the failure of the Ronald Grogan's attorneys to withdraw as required by the Code of Professional Responsibility of the State of Colorado, resulting in their ineffective assistance of counsel to Ronald Grogan.

SUMMARY OF ARGUMENT

The essence of Ronald Grogan's Petition for Writ of Certiorari is contained in the following statement on page 6 of his Petition which states as follows:

> If the constitutional right to counsel in a civil case is to have any meaning, it must necessarily encompass the idea that the role that counsel plays in the trial will meet certain minimum standards of conduct, not the least of which is a minimum amount of effectiveness for a party.

This argument is contrary to case law directly on point. While there is a right to representation of counsel in a civil action, there is no constitutional or statutory right to effective assistance of counsel in a civil case. A party does not have any right to a new trial in a civil suit because of inadequate counsel — the remedy is a suit against the attorneys for malpractice.

An aggrieved party in a civil case involving only private litigants, unlike a defendant in a criminal case, does not have a constitutional right to effective assistance of counsel. The remedy in a civil case, in which chosen counsel is negligent, is an action for malpractice. The constitutional right to effective assistance of counsel has not been extended to any civil proceedings.

ARGUMENT

Ronald Grogan and his counsel have argued that the actions of the trial court prohibited him from representation of counsel and thus resulted in a fundamentally unfair trial contrary to his Fifth and Fourteenth Amendment rights of the United States Constitution. These arguments are wholly without merit and ignore extensive and persuasive case law to the contrary.

A. THE CONSTITUTIONAL RIGHT TO REPRESENTATION OF COUNSEL IN A CIVIL CASE DOES NOT EXTEND TO EFFECTIVE REPRESENTATION BY RETAINED COUNSEL.

In this case, the conflict between Ronald Grogan and his attorneys, Patric Lehouillier and Ronald Peterson, arose as a result of provisions of the Colorado Code of Professional Responsibility D.R. 5-102(B) which requires an attorney that would be testifying contrary to his own client's interest to withdraw. The Code of Professional Responsibility establishes the duties and responsibilities between an attorney and his client. *Taylor v. Grogan,* at 63. It establishes no duty upon the trial court to enforce or intercede in the attorney-client relationship. There is also no duty on opposing counsel to interject themselves into this area. The only existing duty to act, by withdrawing, was that of LeHouillier and Peterson when the conflict arose. Both the Colorado Court of Appeals and the Colorado Supreme Court found that the trial court properly ruled that LeHouillier and Peterson were necessary witnesses for the Defendant, Lorelei Taylor, in her statute of limitations defense. See *Grogan v. Taylor* at 1380 and *Taylor v. Grogan* at 62. Once this ruling was made, the

duty to withdraw was incumbent upon these counsel. Even Mr. Grogan concedes this issue. See Grogan's Petition at page 6.

Nearly identical circumstances were addressed in *Deppe v. Tripp*, 863 F.2d 1356, 1365 (7th Cir. 1988), where both defendant appellants voluntarily agreed to representation by the same trial counsel. Each of these defendant appellants clearly possessed the financial resources to secure separate trial counsel had they so desired and actually did so on appeal. They raised the argument that this conflict led to ineffective assistance of counsel and, therefore, their constitutional rights had been impinged. The Seventh Circuit Court of Appeals ruled that where privately retained counsel performs inadequately, including circumstances where they represent two or more parties notwithstanding a conflict of interest, the proper remedy is not a new trial but rather an action against the attorney for malpractice.[1] The court observed that nothing in that action warranted imposing upon the other side the burden of a new trial due to the alleged conflict arising from the joint representation of two of the civil co-defendants. The court in addition found that the conflict of interest and duty belonged to the attorneys and their clients and that there was no duty for either the court or the opposing counsel to oppose or raise the purported conflict of interest. *Deppe, Supra.*

While Ronald Grogan correctly asserts that there is a limited constitutional right to representation of counsel in a civil case, the scope of that constitutional protection must be distinguished from the broad protections of the right to counsel of criminal defendants, which includes effective assistance of counsel under the Sixth Amendment.

In *Allen v. Barnes*, 721 F.2d 643 (8th Cir. 1983), the court found that the Petitioner had no right to a court appointed attorney, and therefore, it followed that he was not entitled to a new trial any more than a litigant with retained counsel would be in the event of attorney incompetence.

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[1] Counsel was alleged to be in violation of Disciplinary Rule 5-105 of the Code of Professional Responsibility.

This rule was similarly applied by the same court in *Glick v. Henderson,* 855 F.2d 536, 541 (8th Cir. 1988), where it observed that in a civil case there was no constitutional or statutory right for a person to have counsel appointed in a civil case, and it therefore followed that there is no constitutional or statutory right to effective assistance of counsel in a civil case. They expressly ruled that Glick's remedy for any ineffective assistance of appointed counsel was a suit against his attorney for malpractice, not a new trial -- the same remedy which he would have been entitled to in a civil case with a private attorney.

In *Keene Corp. v. Cass,* 908 F.2d 293 (8th Cir. 1990) the same rule was followed in a §1983 civil rights action, ruling that not even in a civil rights action was there a constitutional right to effective assistance of counsel.

In *MacCuish v. U.S.,* 844 F.2d 733, 735 (10th Cir. 1988), a medical malpractice case was brought against the United States government and its employee doctor. The plaintiffs argued that their retained civil counsel had ineffectively and incompetently handled the case. They, therefore, requested a new trial. In arriving at their decision, the court observed that the plaintiff confused her civil case with that of a Sixth Amendment based claim for a retrial of a criminal case. The court held that the Sixth Amendment right to effective assistance of counsel does not apply to civil litigation.

They reasoned that there is no constitutional or statutory right to effective assistance of counsel on a civil case. A party does not have any right to a new trial in a civil suit because of inadequate counsel that has as its remedy a suit against the attorneys for malpractice. In justifying this rule, the court observed that an aggrieved party with retained private counsel, unlike a defendant in a criminal case, does not have a constitutional right to effective assistance of counsel. The remedy in a civil case in which chosen counsel is negligent is an action for malpractice. The right to effective assistance of counsel has not been extended to any civil proceeding. Any incompetence or ineffectiveness of counsel does not provide a basis for a new trial on the merits of an underlying

claim, but rather for a malpractice action arising out of the negligent conduct of the attorney. *MacCuish* at 735.

In *Luera v. Snyder*, 599 F.Supp. 1459, 1465 (D. Colo. 1984), the court compared and contrasted the scope of constitutional protection extended to criminal defendants and civil litigants. The court compared the interest as follows:

> Although the conviction of a criminal defendant who has not had effective assistance of counsel is repugnant to the constitution, the civil litigant has no such constitutional bedding.
>
> A new trial is not warranted based upon the attorney's poor handling of the case. The Plaintiffs having voluntarily chosen these attorneys as their representative in the action cannot now avoid the consequences of the acts or omissions of this freely selected agent.
>
> Any other notion would be wholly inconsistent with our system of representative litigation in which each party is deemed bound by the acts of his lawyer agent and is considered to have notice of all facts, notice of which can be charged to the attorney.

The above has been the position of Lorelei Taylor throughout this litigation and at trial on the merits of this case. See *Grogan v. Taylor* at 1382.

There is absolutely no doubt that the circumstances under which Ronald Grogan went into this trial was based on the overt and conscious decision of Mr. Grogan and his attorneys, LeHouillier and Peterson. See *Grogan v. Taylor* at 1381. Any harm to Mr. Grogan arose from the failure of LeHouillier and Peterson to meet the ethical duty owed to their client. It was not the duty of the trial court nor opposing counsel to act in the absence of their failure to act.

The trial court in this case did not deprive Ronald Grogan of representation of counsel. He had representation of counsel.

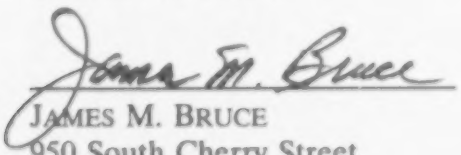
There was clearly ineffective assistance of counsel to Ronald Grogan from Patric LeHouillier and Ronald Peterson, but that has no constitutional implications. Ronald Grogan's remedy does not lie with the United States Supreme Court but in a malpractice action against his former attorneys.

CONCLUSION

Lorelei Taylor would ask that Ronald Grogan's Petition for Writ of Certiorari be denied and that this case be remanded to the State of Colorado for handling pursuant to the Order of the Colorado Supreme Court in *Taylor v. Grogan,* 900 P.2d 60 (Colo. 1995), and for what other and further relief as this Honorable Court may deem just and proper under the circumstances.

Respectfully Submitted,

QUIGLEY & BRUCE



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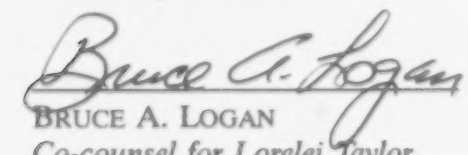

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